IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2006 Session

STATE OF TENNESSEE v. MICHAEL GAINES

Direct Appeal from the Circuit Court for Marion County
No. 6634 Buddy D. Perry, Judge

No. M2005-01620-CCA-R3-CD - Filed April 24, 2007

The appellant, Michael Gaines, was convicted by a jury in the Marion County Circuit Court of second degree murder, attempted second degree murder, four counts of reckless endangerment, and possession of a weapon where alcoholic beverages are served. The appellant received a total effective sentence of thirty-five years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence supporting his second degree murder conviction, the trial court's ruling regarding the admission of a prior conviction for aggravated assault as impeachment evidence, and the trial court's instructions to the jury regarding felony murder and the definition of "knowing." Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Marshall A. (Mark) Raines, Jr., and H. Graham Swafford, Jr., Jasper, Tennessee, for the appellant, Michael Gaines.

Robert E. Cooper, Jr., Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Sherry Gouger, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

As a result of the events that took place at Raven's Lounge in South Pittsburg on May 18, 2002, the appellant was charged in a multi-count indictment with the premeditated first degree murder of Derrick Glenn; the felony murder of Derrick Glenn during the attempt to perpetrate the first degree murder of Tommy Upshaw; the attempted premeditated first degree murder of Tommy

Upshaw; four counts of reckless endangerment; and possession of a firearm where alcohol is served for consumption.

The State's proof at trial revealed that on the night of May 17, 2002, into the early morning hours of May 18, 2002, a crowd gathered at Raven's Lounge, a club in South Pittsburg. The club was operated by Stanley Upshaw, and his brother, Tommy Upshaw, worked at the front door of the club as a bouncer.[1] Part of Tommy's job entailed using a hand-held metal detector to scan patrons for weapons before allowing them entry into the club. On the night of the offenses, Anna Diana Robertson was working at Raven's Lounge as a bartender, and Patricia Ann Robertson was cleaning tables.[2]

That night, the appellant was among the many patrons of the crowded club; he sat in the VIP section. Derrick Glenn, the appellant's cousin, was at the club with his fiancé, Tammy Cummings. Glenn and Cummings sat at a table in the back of the club near the pool tables. Walter Gaines, who is the appellant's cousin and Glenn's uncle, came to the club and sat at the bar.

At approximately midnight, Stanley made an announcement that the use of marijuana in the club was prohibited. After the announcement, the appellant yelled, "f[***] you and your brother." Tommy told the appellant that the club was his brother's place of business, and he should not be yelling. Stanley came to talk to the appellant, and Tommy returned to his station by the front door, believing that everything was over. At Stanley's request, Anna called for police assistance. Officer Tyrone Green came to the club but left when the situation calmed.

The appellant left the club after the announcement, but he returned shortly thereafter. The appellant became upset because Tommy checked him for weapons each time he exited and reentered the club. Every time the appellant returned, he sat in the VIP section of the club, staring at Tommy.

At approximately 2:00 a.m., near closing time, the appellant launched himself over the half-wall separating the VIP section from the rest of the club, jumping Tommy from behind. The appellant got Tommy on the floor and was on top of him, beating him. Patrons pulled the appellant off Tommy. Tommy stood, with Glenn standing nearby. None of the State's witnesses saw Tommy pull a knife on the appellant; however, Agent Billy Miller said that Tommy acknowledged that he had a razor blade during the fight. At trial, Tommy denied pulling a knife during the fight. After the fight was broken up, two gunshots were fired. Patricia noticed that the appellant had a gun and was holding it sideways, "pointing it toward [Tommy] the person he was shooting at." Gaines saw the appellant run out the front door with a gun in his hand. No one saw the appellant in the club after the shots were fired.

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[1] Some of the witnesses in this case share a surname. Therefore, for clarity, we have chosen to utilize their first names. We mean no disrespect to these individuals.

[2] The transcript of the trial refer to these witnesses as "Anna Diana Robertson" and "Patricia Ann Robertson." However, the indictments charging the appellant with the reckless endangerment of these women list their names as "Anna Robinson" and "Patricia Robinson." We will utilize the names contained in the transcript.

Glenn was hit by one of the shots. He fell to the floor, bleeding profusely. Several people in the club attempted to help Glenn to no avail. He was dead by the time the police and an ambulance arrived. Glenn died from a gunshot wound to his back which exited his chest and caused him to bleed to death internally.

A few hours after the shooting, the appellant went to the Greyhound bus station in Chattanooga and bought a ticket for the first bus heading "out west." The bus was bound for Las Vegas, Nevada. Before the appellant boarded the bus, Tasha McCamey picked up the appellant at the bus station. McCamey drove the appellant to her house in South Pittsburg. Minutes after their arrival, police came to McCamey's residence to locate the appellant. McCamey told police that the appellant was not there. After obtaining permission to search the house, police located the appellant hiding in a bathroom of the house. The appellant told the officers that they had the wrong man; he had not been at Raven's Lounge that night.

After the conclusion of the State's case-in-chief, several witnesses testified for the defense. The defense proof centered around the appellant's contention that from the time of the appellant's arrival at Raven's Lounge, Tommy harassed him. According to defense witnesses, the harassment began when Tommy searched the appellant more thoroughly than he did other patrons, and Tommy continued to stare at the appellant throughout the evening.

Shortly after the appellant's arrival at the club, Kim Kelso returned to the appellant a gun that her boyfriend, Kevin Mitchell, had borrowed from the appellant one to two weeks earlier. At the appellant's request, Delorah Starkey kept the gun in her purse most of the evening.

At midnight, after Stanley announced that marijuana smoking was prohibited in the club, Tommy accused the appellant of smoking marijuana. The appellant denied the accusation. Tommy continued to stare at the appellant. At 2:00 a.m., the appellant got his gun from Starkey and prepared to exit the club. As he was walking past Tommy, Tommy hit the appellant. The two men wrestled, and Glenn joined in the fight. During the course of the fight, the appellant and Glenn got Tommy on the floor, kicking and hitting him. Patrons of the club pulled Glenn and the appellant off Tommy. Tommy stood and brandished a knife or a straight razor, threatening to kill the appellant. The appellant pulled a gun and fired into the crowded club in Tommy's direction. After the shooting, the appellant ran from the club. At that time, the appellant did not know anyone had been shot.

A few hours after the shooting, the appellant met with Mitchell and Kelso in an alley behind the appellant's mother's house. Kelso and Mitchell told the appellant that Glenn had been shot; however, they did not know that Glenn was dead. Kelso and Mitchell, possibly with the help of Santonio Myers Jenkins, drove the appellant to an apartment in Chattanooga. While at the apartment, the appellant learned that Glenn was dead. The appellant had someone at the apartment drive him to the bus station. The appellant bought a ticket for a bus destined for Las Vegas because he had family there. McCamey picked up the appellant at the bus station and drove him to her house. Shortly thereafter, police found the appellant in McCamey's bathroom. The appellant acknowledged that when police found him, he told them that they had the wrong man because he had not been at

Raven's Lounge that night. At trial, the appellant said that he had not intended to turn himself in until he "could get a hold of me a lawyer."

Based upon the foregoing, the jury found the appellant guilty of two counts of the second degree murder of Derrick Glenn, which two counts merged; the attempted second degree murder of Tommy Upshaw; the reckless endangerment of Walter Gaines; the reckless endangerment of Patricia Robertson; the reckless endangerment of Stanley Upshaw; the reckless endangerment of Anna Robertson; and the possession of a firearm where alcohol is served for consumption. On appeal, the appellant raises the following issues for our review: whether the evidence was sufficient to sustain the appellant's second degree murder convictions, whether the jury charge regarding felony murder "is incomprehensible if not erroneous," whether the trial court erroneously defined "knowing," and whether the trial court erred in ruling that the State could question the appellant about previous convictions of aggravated assault and possession of cocaine with the intent to sell.

II. Analysis

A. Impeachment by Prior Convictions

On appeal, the appellant argues that the trial court erred by allowing the State to impeach the appellant with his prior convictions for aggravated assault and possession of cocaine with the intent to sell. The appellant contends that these convictions should not have been admissible under Tennessee Rule of Evidence 609 to impeach the appellant.[3] Specifically, the appellant says,

> "The former aggravated assault case was old, stale and occurred when the [appellant] was a very young man (teenager). This case has absolutely nothing to do with credibility. It is insisted that allowing this type of information before the jury was impermissibly prejudicial. The drug case was totally unrelated to the case sub judice."

The State contends that the trial court properly admitted the aggravated assault conviction under Rule 609. However, the citation to the record provided by the State references a discussion in which the trial court conditionally admitted the aggravated assault conviction under a different rule of evidence.

The history of the appellant's complaints regarding the admissibility of his prior convictions is lengthy and convoluted. The record on appeal does not contain a motion by the appellant requesting that the appellant's prior convictions be excluded from trial. However, our review of the record reveals that on December 29, 2003, prior to trial, the trial court filed an order ruling on various motions filed by the appellant, including a "Motion to Disallow the State to Use Evidence of the [appellant's] Prior Convictions for Impeachment Purposes." In that order, the trial court ruled

[3] In his brief, the appellant makes no citation to the record indicating where the trial court admitted the prior convictions under Rule 609, arguably waiving the issue. See Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7).

that, under Rule 609,[4] the appellant's prior convictions for aggravated assault and possession of cocaine with the intent to sell were not probative on the issue of dishonesty and instructed that the convictions would not be admissible to impeach the appellant's testimony. The court qualified the ruling, stating

> "However, should the evidence presented at the trial of this matter, through the testimony of the [appellant], or otherwise, create an issue as to which the evidence of such prior convictions would be relevant, the Court will conduct an out of jury presence hearing to determine the admissibility of the same."

The transcript of the appellant's trial reflects that immediately prior to the appellant's testimony, the appellant raised an objection to the introduction of the prior convictions, arguing at

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[4] Tennessee Rule of Evidence 609 provides:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:
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> (1) The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record. If the witness denies being the person named in the public record, identity may be established by other evidence.
>
> (2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.
>
> (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.
>
> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

that time that evidence of the convictions was not admissible under Tennessee Rule of Evidence 404(a).[5] The following colloquy occurred:

> [Defense counsel]: The State has filed a motion of intent to use the [appellant's] prior convictions for impeachment purposes. This is a case where we intend to offer evidence that the [appellant] acted in self-defense, what we want a clear understanding of is that does not open the door to allow them to come in and you know use the prior aggravated assault conviction and the prior drug conviction to impeach him. . . . I'm specifically referring to Rule 404-A1 and 404-A2 . . . .
>
> . . . .
>
> [The State]: Your Honor, your ruling on this with a previous order by the Court was that I would not use the drug conviction and the aggravated assault conviction strictly to impeach on credibility. You said as to the aggravated assault, if the [appellant] in testifying created an issue whereby the prior conviction might become relevant, then you would rule on that at that time. Of course I don't know what he's going to say, so that puts me [at] sort of a disadvantage.
>
> . . . .
>
> [The Court]: I think if you try to paint yourself as the peaceful person and you have in your background a non-peaceful traits then you've opened that door, but I would have like to have looked at this issue before now. . . .

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[5] Tennessee Rule of Evidence 404 provides:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with the character or trait on a particular occasion, except:
>
> (1) Character of Accused. Evidence of a pertinent character trait offered by the accused or by the prosecution to rebut the same.
>
> (2) Character of Victim. Evidence of a pertinent character trait of the victim of crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.
>
> (3) Character of a Witness. Evidence of the character of a witness as provided in Rules 607, 608, and 609.

> [Defense counsel]: I filed a Motion to Suppress the prior convictions and that's why I did that.
>
> [The Court]: And we just didn't have a hearing on it?
>
> [Defense counsel]: We did and Your Honor excluded them, unless the [appellant] opened the door.[6]
>
> . . . .
>
> Well, let me supplement the fact that he's not going to get up here and claim he's an angel. They were both mouthing back and forth at one another, they were both at each other . . . .
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> . . . .
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> [The Court]: I think the rule is such that if he gets on the witness stand and he crosses the line and I don't know where the line is going to be, we're going to just have to hear the testimony, but if he gets close to the point of saying that the other gentleman was the aggressor and he had nothing to do with the aggression, then he opens his character for peace and violence and once that's opened, the [State] can cross-examine him on the issue of the prior aggravated assault and I'm going to find for this record in my judgment that the probative value of that information outweighs [its] prejudicial effect and it will come in solely for the purpose of credibility of the [appellant] not as substantive evidence and I'll give a charge to that effect. . . .

Thereafter, on direct examination, prior to testifying regarding the events of the night in question, the appellant testified concerning his prior conviction for aggravated assault. The appellant's prior conviction for drug possession was never introduced to the jury.

As we stated earlier, on appeal the appellant summarized his Rule 609 argument by saying "[t]he former aggravated assault case was old, stale and occurred when the [appellant] was a very young man (teenager). This case has absolutely nothing to do with credibility. It is insisted that allowing this type of information before the jury was impermissibly prejudicial. The drug case was totally unrelated to the case sub judice." From the record, it is clear that any issue related to the prior drug possession conviction is moot because the conviction was not admitted at trial. Moreover, the appellant's argument that the trial court erred in admitting the aggravated assault conviction under Rule 609 is disingenuous because prior to trial the trial court correctly ruled in the appellant's favor

[6] The record on appeal does not contain a transcript of this hearing.

under Rule 609, finding that the conviction was not probative of truthfulness. Instead, at trial the trial court ruled that the prior conviction for aggravated assault was admissible for impeachment under Rule 404(a) conditioned upon the appellant "opening the door" to his character for peacefulness. A careful review of the appellant's brief reveals no challenge to the trial court's 404(a) ruling; all of the appellant's arguments and citations to case law relate to Rule 609. It appears that the appellant may have failed to distinguish between Rule 609 and Rule 404(a). However, these rules are distinct and have different standards of application and consequences. Therefore, we conclude that the appellant's argument regarding the potential Rule 404(a) admission of the conviction to be waived. Moreover, we note that the trial court stated that the prior aggravated assault conviction would be admissible only if the appellant "opened the door" during his testimony. The appellant introduced the prior conviction before testifying to any facts that would have opened the door. The appellant is not entitled to relief on this issue.

B. Jury Instructions

As his next issue, the appellant argues that the felony murder "jury charge was incorrect, incomprehensible and misunderstood. The appellate court should give claritive instructions concerning the felony murder jury charge." Within his argument on this issue, the appellant raises several concerns. First, the appellant appears to argue that second degree murder is not a lesser-included offense of felony murder. Second, the appellant contends that the felony murder pattern jury instruction is confusing and should be changed. Included within this contention, the appellant argues that in order to convict the accused of felony murder, the jury must find the accused guilty of the specific charged predicate felony, not a lesser-included offense of the predicate felony. As an additional concern regarding the jury instructions, the appellant contends that the trial court improperly defined the mental state of "knowingly" in the context of second degree murder. We will address each of these issues in turn.

1. Felony Murder Instruction

The appellant's first complaint regarding the felony murder jury instruction is that second degree murder is not a lesser-included offense of felony murder; therefore, the trial court's instruction to the jury was erroneous. However, our supreme court has concluded that second degree murder is a lesser-included offense of felony murder. State v. Ely, 48 S.W.3d 710, 721-22 (Tenn. 2001); see also State v. Thomas, 158 S.W.3d 361, 379-80 (Tenn. 2005). Accordingly, the trial court did not err in instructing the jury that second degree murder is a lesser-included offense of felony murder.

The appellant also argues that the pattern jury instruction for felony murder is confusing and should be changed. The appellant maintains that the correct jury charge procedure on felony murder should be as follows:

> 1. Charge the jury on First-Degree premeditated/common law murder. If the jury convicts of First-Degree Murder then the jury

> should not go to the felony murder charge due to the fact that the convictions would merge or there could not be two 1st degree convictions for one death.
>
> 2. If, however, the jury did not convict [the accused of] First-Degree common law pre-meditated Murder (or if in fact the prosecution after getting a conviction for murder one but just wanted to make double sure they got a murder one conviction) then for the jury to consider felony murder (which would not be impermissible) in order to obtain a first degree conviction the jury must made a specific finding of [the predicate offense].

Initially, we note that the appellant was not convicted of felony murder. Therefore, any concerns he raises regarding the felony murder instruction are moot. State v. Faulkner, 154 S.W.3d 48, 61 (Tenn. 2005). Nevertheless, we note that this court has previously explained that there is no impropriety in charging a jury on both the premeditated first degree murder and felony murder of the same victim because the offenses allege a homicide committed by "separate means" which are "not mutually exclusive." State v. Addison, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). Hence, the trial court did not err in charging both premeditated first degree murder and felony murder.[7]

In the instant case, the trial court followed Tennessee Pattern Jury Instruction 7.03(b) when instructing the jury on the offense of felony murder. Included in that instruction is a requirement that the jury find that the accused intended to commit attempted first degree murder, the predicate felony in this case. The trial court correctly instructed the jury on the elements of felony murder. Therefore, the appellant's concerns that the trial court's instruction did not specify the need to find the appellant guilty of the predicate felony are unfounded.

2. Definition of "Knowing"

As his final challenge to the jury instructions, the appellant summarily argues that the trial court "erred in the jury charge because of a lack of explaining, 'knowing.'" The appellant contends that the court did not properly define the "knowing" mental state of second degree murder. However, the appellant does not elucidate a specific error by the trial court.

In State v. Ducker, 27 S.W.3d 889, 896 (Tenn. 2000), our supreme court explained that second degree murder is strictly a result-of-conduct offense. "A result-of-conduct offense requires that the culpable mental state accompany the result as opposed to the nature of the conduct." Id. Recently, our supreme court held that

[7] Moreover, in the instant case after the jury returned with two guilty verdicts regarding the same homicide, the trial court properly merged the convictions.

> a proper instruction defining "knowingly" . . . does not include the nature-of-conduct and circumstances-surrounding-conduct language because second degree murder . . . [is a] result-of-conduct offense[]. We are not convinced, however, that the inclusion of such language is an error of constitutional dimension when the instruction also includes the correct result-of-conduct definition.

State v. Faulkner, 154 S.W.3d 48, 58-59 (Tenn. 2005).

In the instant case, our examination of the trial court's instruction to the jury regarding second degree murder reveals that the court defined second degree murder as the unlawful and knowing killing of the victim. The trial court instructed the jury that "a person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Accordingly, the trial court properly defined "knowingly" in result-of-conduct terms. This issue is without merit.

C. Sufficiency of the Evidence

As his final issue, the appellant challenges his convictions for second degree murder, arguing that "[t]here is no way to get around the fact that [the facts at trial] evidences that there is no plan or scheme."[8] In other words, the appellant argues that there was no proof of a "knowing" killing. On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

On appeal, the appellant does not dispute that he shot the gun or that Glenn was killed by the gunfire. The appellant's sole complaint is the mental state behind the shooting. "Our jurisprudence recognizes that the mental state, a necessary factor of almost all our criminal statutes, is most often proven by circumstantial evidence, from which the trier of fact makes inferences from the attendant

[8] The appellant does not challenge the sufficiency of the evidence to support his convictions of attempted second degree murder, four counts of reckless endangerment, and possession of a weapon where alcoholic beverages are served.

circumstances and from which that body weighs the circumstantial evidence." State v. Jeffrey Antwon Burns, No. M1999-01830-CCA-R3-CD, 2000 WL 1520261, at *3 (Tenn. Crim. App. at Nashville, Oct. 13, 2000).

To sustain the appellant's conviction for second degree murder, the State was required to prove that the appellant knowingly killed the victim. See Tenn. Code Ann. § 39-13-210(a)(1) (2003). Our supreme court has determined that second degree murder is a result of conduct offense. See State v. Ducker, 27 S.W.3d 889, 896 (Tenn. 2000). Accordingly, "[a] person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b) (2003).

In the light most favorable to the State, the proof adduced at trial revealed that after an announcement was made prohibiting the use of marijuana in the club, the appellant made a derogatory remark towards Tommy. Tommy deflected the remark and continued his work as a bouncer. At approximately 2:00 a.m., the appellant jumped over a half-wall to begin a fight with Tommy. Patrons of the club pulled the appellant off of Tommy. Tommy stood, and Glenn was nearby. The appellant pulled his gun from his waistband and fired twice in the crowded club in Tommy's direction. The victim was killed by the gunfire. The appellant then attempted to flee to Las Vegas. We conclude that the foregoing evidence is sufficient for a rational trier of fact to find the appellant guilty of the second degree murder of the victim. See State v. Charles W. Jones, No. M2001-00353-CCA-R3-CD, 2001 WL 1597742, at *2 (Tenn. Crim. App. at Nashville, Dec. 13, 2001).

III. Conclusion

Finding no reversible error, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE